

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of AT&T  
Wireless Services, Inc. for Arbitration  
of an Interconnection Agreement  
with US WEST Communications,  
Inc. Pursuant to 47 U.S.C. § 252

REPORT OF THE ADMINISTRATIVE  
LAW JUDGE: RECOMMENDED  
ARBITRATION DECISION

The above-entitled matter came on for arbitration before Administrative Law Judge Allen E. Giles on May 6 and 7, 1997 in the Minnesota Public Utilities Commission's Large Hearing Room, 121 Seventh Place East, Suite 350, St. Paul, Minnesota.

By Order dated April 17, 1997, the Minnesota Public Utilities Commission limited parties to this proceeding to the following: AT&T Wireless Services, Inc. ("AWS"), US WEST Communications, Inc. ("US WEST"), the Minnesota Department of Public Service ("DPS") and the Office of Attorney General, Residential Utilities Division ("OAG").

Joseph S. Faber and Daniel M. Waggoner, San Francisco, California; and Mark J. Ayotte and John B. Van de North, St. Paul, Minnesota, appeared on behalf of AWS.

Victoria T. Aguilar, Minneapolis, Minnesota, William P. Heaston, Denver, Colorado, and William J. Batt, Boise, Idaho, appeared on behalf of US WEST Communications, Inc.

J. Jeffery Oxley, Ellen Gavin and Brent Vanderlinden, Assistant Attorneys General, St. Paul, Minnesota, appeared on behalf of the Department of Public Service.

Eric Peck, Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of the Office of Attorney General, Residential Utilities Division.

Kevin O'Grady and John Lindell, St. Paul, Minnesota, participated in a neutral capacity as Public Utilities Commission Staff to the proceeding.

**I. INTRODUCTION AND PROCEDURAL HISTORY**

The purpose of this proceeding is to arbitrate an interconnection agreement between US WEST, a Local Exchange Carrier ("LEC"), and AWS, a telecommunications carrier, in accordance with the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. (hereinafter referred to as the "Act"). One general purpose of the Act is to promote the opening of the telecommunications market to competition on the local level. The Act establishes a scheme that fosters the entry into the local exchange market by telecommunication carriers such as AWS. Under the Act, telecommunications carriers are encouraged to negotiate interconnection agreements with an incumbent LEC such as US WEST to provide local telecommunications services. Where these parties' negotiations fail, State Commissions are authorized to arbitrate disputes to eliminate barriers to achieving an interconnection agreement.

On October 3, 1996, AWS served US WEST with a request to negotiate interconnection and other related arrangements under the Act. On March 7, 1997, AWS filed a Petition for Arbitration requesting the Minnesota Public Utilities Commission to arbitrate the issues unresolved by the negotiations. In accordance with section 252(b)(1) of the Act, AWS requested the Commission to arbitrate and resolve all of the unresolved issues raised in AWS' Petition, as well as any unresolved issues raised in US WEST's response.

By Order dated April 17, 1997, the Commission granted AWS' Petition and referred the matter to the Minnesota Office of Administrative Hearings to conduct the necessary proceedings and to issue a Recommended Arbitration Decision. The Commission limited intervention into the proceeding to the Department of Public Service and the Office of Attorney General. The Department and the Attorney General subsequently intervened in the proceeding.

A Prehearing Order dated April 28, 1997 established specific procedures for the conduct of discovery and the evidentiary hearings. The Prehearing Order scheduled a technical issues workshop for May 2, 1997 to discuss how the wireless network functions and how it interconnects with the landline network. Finally, evidentiary hearings were conducted on May 6 and 7, 1997 for the purpose of conducting cross-examination of prefiled testimony of various witnesses to the proceeding. Although a party to this proceeding, the OAG did not sponsor any witness or appear at the evidentiary hearing.

The Act requires that the Commission resolve this arbitration by July 3, 1997. The Commission has requested that the Administrative Law Judge issue a Report on all issues submitted for arbitration by June 6, 1997. The ALJ's decision must set forth the recommended resolution of each issue submitted for arbitration and provide a recommended schedule for implementation by the parties.

## **II. APPLICABLE LEGAL STANDARDS**

Various statutory and decisional law serve as the legal standards for determining the outcome of the disputed issues in this proceeding. The legal standards include all of the following: Minn. Stat. § 237.16 which imposes a number of obligations on providers of telephone service so as to facilitate the development of a competitive market and protect the public interest; the Telecommunications Act of 1996, particularly sections 251 and 252; the Commission's Order Resolving Arbitration Issues dated December 2, 1996 in the Consolidated Arbitration Proceeding ("Consolidated Arbitration Order"); the Federal Communication Commission (FCC); First Report and Order, In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, dated August 8, 1996 (the "FCC Order"); the Eighth Circuit Court of Appeals Order in Iowa Utilities Board, et al. v. FCC, et al. (Docket No. 96-3321, et al.), issued on October 15, 1996, and revised by subsequent Order issued on November 1, 1996 ("Eighth Circuit Order"); and the Commission's Order issued on April 17, 1997, Order Granting Petition and Establishing Procedures for Arbitration, is significant because it establishes the basic ground rules and criteria for decision in this case ("Order Granting Petition").

Overall, the statutory and decisional law require the Judge and the Commission to resolve issues in this arbitration by imposing terms and conditions that are consistent with the requirements set forth in the statutory and decisional law. The terms and conditions must also be just, reasonable, non-discriminatory and fair to both AWS and US WEST, and ultimately, to the customers of these carriers.

### **III. BURDEN OF PROOF**

The Commission has determined that US WEST has the burden of proof in this proceeding. In its Order Granting Petition and Establishing Procedures for Arbitration (Order Granting Petition) dated April 17, 1997, the Commission stated:

The burden of proof with respect to all issues of material fact shall be on U S West. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute.

Order Granting Petition at 10.

The FCC has also specifically established a proof standard of clear and convincing evidence to apply to LECs who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements. That is, LECs must prove to the Commission by clear and convincing evidence that an interconnection request "would result in specific and significant adverse network reliability impacts" before the LEC may reject an interconnection request on network reliability grounds. 47 C.F.R. § 51.5. Similarly, the FCC requires a LEC to prove to the Commission that an interconnection method is not technically feasible before the Commission can deny an

interconnection request. 47 C.F.R. § 51.321(d). The explicit placement of the burden of proof on US WEST by the Commission and the FCC acknowledges that US WEST and other LECs have a monopoly, not only over the local exchange network but also over information about the network that is needed to make major decisions in this proceeding.

Finally, in the Order Granting Petition, the Commission also recognized that there may be circumstances where US WEST does not have control of critical information on a particular arbitration issue and where AWS is the proponent of an issue and has control and access to important or critical information "the ALJ may shift the burden of production and require AT&T Wireless, rather than US WEST to go forward with the evidence on that point." Order Granting Petition, p. 10.

#### **IV. PARTIAL STAY OF THE FCC'S FIRST REPORT AND ORDER AND RULES**

On October 15, 1996, the Eighth Circuit Court of Appeals issued an Order Granting Stay Pending Judicial Review ("Eighth Circuit Order") of selected portions of the FCC Order and Rules. See, Iowa Utilities Board v. Federal Communications Commission, No. 96-3321 (8th Cir. Oct. 15, 1996). The Eighth Circuit Order is premised on jurisdictional arguments concerning the FCC's authority to issue pricing regulations affecting intrastate rates. The Eighth Circuit Order affects only five (5) specific Rules promulgated by the FCC Order: 47 C.F.R. §§ 51.501-51.515; 51.601-51.611; 51.701-51.717; 51.809; and the proxies established for line ports as set forth in the FCC's Order on Reconsideration dated September 27, 1996. The areas of the FCC Order covered by the Stay are the pricing rules and the "most favored nations" rule.

Moreover, on November 1, 1996, the Eighth Circuit Court of Appeals issued an Order partially lifting its October 15 Order with respect to commercial mobile radio service ("CMRS") issues. In particular, the Court determined the stay should be lifted with respect to reciprocal compensation set forth in FCC Rules 51.701, 51.703 and 51.717. The November 1 Order therefore rendered all of these Rules applicable to this arbitration proceeding.

Under the terms of the Eighth Circuit Order, the ALJ and the Commission will determine prices pursuant to any applicable state law and section 252(d) of the Act. While the FCC's pricing rules are no longer mandated for use by the Commission, they are available to be adopted by the Commission if it so chooses. In very large part, the ALJ has independently considered the FCC's analysis of the terms and policies underlying the Act, and the record evidence in determining the appropriate mechanism for establishing costs and prices in Minnesota in this proceeding.

#### **V. FUTURE MODIFICATIONS TO THE ARBITRATED AGREEMENT**

The DPS has recommended that the Judge acknowledge and recognize the practical view that, regardless of the arbitration decisions, the agreement between the

parties will need to be modified for several foreseeable reasons identified. Those reasons are as follows.

First, as discussed more fully below, the Judge agrees with the DPS that the cost and price information is not of sufficient reliability to make anything but an interim decision on those issues. US WEST's costs should be determined in the Generic Cost Proceeding currently underway for US WEST, Docket No. P-442, 52321, 3167, 466, 421/CI-96-1540.

Second, the parties did not present any specific interconnection requests to the ALJ in this proceeding. Before the Commission finds that a particular interconnection request by AWS is not technically feasible or that it presents network reliability problems, it must have an evidentiary basis on which to do so. As technology changes however, certain requests may no longer be technically infeasible or threaten network reliability. Thus, parties should be permitted to reopen the agreement if at a later date there is sufficient evidence that a particular request has become technically feasible or that network reliability will not be harmed by a particular interconnection request. Likewise, US WEST may wish to reopen an agreement if there is sufficient evidence that an interconnection order has become technically infeasible or causes network reliability concerns.

Third, the need for orderly competition may require that future decisions by the Commission be reflected in changes to the agreement between AWS and US WEST. Arbitrated agreements under the Act should not be exempt from changes necessary to promote competition or protect the public interest.

Finally, the Commission or the FCC may issue subsequent rules that affect the agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate in good faith if it refuses "to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules." 47 C.F.R. § 51.301 (c)(3). For the foregoing reasons, the ALJ finds that the Interconnection Agreement is subject to modification by negotiation or by future FCC or Commission order.

## **VI. FINAL CONTRACT LANGUAGE**

The ALJ recognizes that the Interconnection Agreement may be continuing to evolve as the parties continue to negotiate. The ALJ's intention is that the Agreement contain the terms negotiated by the parties, whether agreed to before, during, or after this particular proceeding and the Arbitration Decision. Thus, any provision agreed to by the parties supersedes any determination made below.

Both AWS and US WEST have submitted to the Commission proposed contracts attached to the Petition, which are properly part of the record and before the ALJ and Commission although not separately marked as hearing exhibits. Tr. Vol. 1 at

8-9. In the following sections of this Arbitration Decision, the ALJ sets forth his recommended decision on the issues.

## **VII. ADMISSION OF PROPRIETARY EXHIBIT 15**

During the trial, US WEST objected to the admission into evidence of Proprietary Exhibit 15. In US WEST's post-hearing argument, the Company has withdrawn its objection to the admission of Proprietary Exhibit 15. Therefore, Proprietary Exhibit 15 is hereby received as a part of the evidence in this proceeding.

## **VIII. RECOMMENDED DECISION ON ISSUES**

### **A. Access to Service Agreement of Other Carriers**

**Issue:** Is AWS entitled to the "same rates, terms and conditions" contained in any approved agreement between US WEST and any other telecommunications carrier?

**Applicable Law:** Section 252(i) of the Act provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

**Decision:** The parties should include in their agreement language recommended by the Commission in the consolidated arbitration that recognizes the unsettled state of the law on the application of section 252(i).

**Rationale:** In 47 C.F.R. § 51.809, the FCC interprets section 252(i) to require local exchange carriers to make available "any individual interconnections, service or network element arrangement contained in any agreement to which it is a party that is approved by a State Commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement." On October 15, 1996, the Eighth Circuit Court of Appeals stayed 47 C.F.R. § 51.809, the so-called "pick and choose" rule at issue. In the Commission's Order in the Consolidated Arbitration Proceeding, Order After Reconsideration, March 17, 1997, the Commission required that the parties include in their agreement a recognition that the law on this issue is unsettled. The ALJ believes that it is appropriate to do the same in this case. The language recommended by the Commission is as follows:

The parties agree that the provisions of section 252(i) of the Act shall apply, including final state and federal interpretive regulations in effect from time to time.

## **B. Points of Interconnection**

**Issue:** What standards or limitations apply to the physical interconnection between the networks of AWS and US WEST?

**Applicable Law:** Section 251(c)(2) of the Act provides that incumbent Local Exchange Companies must provide interconnection to their networks at any technically feasible point.

**Decision:** AWS is entitled to interconnect its network with US WEST at any point that is technically feasible subject to space and equipment limitations. AWS is entitled to physical collocation of equipment necessary for interconnection or access to unbundled network elements, including RSUs and DLCs.

**Rationale:** AWS contends that it is entitled to interconnect with US WEST at any point AWS chooses provided that the interconnection is technically feasible and that sufficient space is available. US WEST argues that points of interconnection must be established by negotiation and that the company has the right to determine the points of interconnection taking into consideration the demands of other network interconnections.

In the Consolidated Arbitration Order, the Commission ordered US WEST "to allow interconnection at any technically feasible point on its network requested by the CLEC". Consolidated Arbitration Order at 13. With respect to the issue of equipment which AWS may permissibly collocate, the Commission explicitly ordered that US WEST permit RSUs and DLCs to be collocated. Consolidated Arbitration Order at 16. The Commission found that collocated equipment need not be exclusively used for interconnection or access to unbundled network elements.

The ALJ finds that the Commission's decision applies with equal force to this issue.

## **C. Pricing of Services**

**Issue:** What are the appropriate rates for transport and termination services?

**Applicable Law:** Section 251(c) of the Act requires incumbent LECs to provide new entrants with interconnection to their facilities, access to their unbundled network elements and collocation on their premises "on rates, terms and conditions that are just, reasonable and nondiscriminatory in accordance with [sections 251 and 252]". Under the Act, determinations of just and reasonable rates for interconnection and network elements must be based on cost, "without reference to a rate of return or other rate

base proceeding". It also permits State Commissions to "include a reasonable profit". 47 U.S.C. § 252(d)(1). The overriding principle to be followed is that US WEST's rates should be based on its Total Element Long Run Incremental Cost ("TELRIC").

**Decision:** Permanent rates in this case should be determined in the generic cost docket. It is appropriate to adopt as interim rates in this proceeding the interim rates for transport and termination ordered by the Commission in the Consolidated Arbitration Proceeding. The interim rates will prevail from the conclusion of this proceeding to the conclusion of the generic docket. The interim rates will be subject to true-up based on the permanent rates established in the Generic Cost proceeding.

**Rationale:** The ALJ agrees with the DPS that the parties have not submitted sufficient information on which to determine permanent rates for transport and termination. US WEST cost studies are not part of the record and US WEST is not supporting any cost study, including those it provided to AWS. AWS is seeking to rely on US WEST cost studies but its witness, Dr. Zepp, found the cost studies to be seriously flawed and made adjustments to depreciation rates and cost of capital used in the cost studies. The Commission did not adopt US WEST cost studies in the Consolidated Arbitration Proceeding. AWS cost estimates were not based on TELRIC principles for a variety of reasons. AWS' cost submission are unreliable as well. In light of the insufficient cost information on the record, the ALJ believes that it is appropriate to impose on the parties the interim rates for transport and transportation ordered by the Commission in the Consolidated Arbitration Proceeding. Permanent rates for this case should be those established in the US WEST Generic Cost case. The interim rates would prevail from the conclusion of this proceeding to the conclusion of the Generic Cost case, subject to true-up, just as the interim rates from the consolidated arbitration are subject to the true-up at the permanent rates established in the Generic Cost case.

#### **D. Effective Date for the Commencement of Reciprocal Compensation**

**Issue:** Whether reciprocal compensation should begin on October 3 or November 1, 1996. Whether the 1994 contract rates were changed by subsequent agreement by the parties.

**Applicable Law:** Reciprocal compensation obligations under the Act begin with a request for a new CMRS interconnection agreement. (47 C.F.R. § 51.717(b)). In the text of the FCC Order, the right to reciprocal compensation pending a new agreement begins "as of the effective date of the rules we adopt pursuant to this order." (FCC Order, ¶ 1094). The effective date of the FCC Rules is defined as "30 days after publication of a summary in the Federal Register." (FCC Order, ¶ 1442). However, 47 C.F.R. Minn. Stat. § 51.717(b) was stayed by the Eighth Circuit Order. The stay was lifted on November 1, 1996.

**Decision:** AWS is entitled to reciprocal compensation from US WEST beginning October 3, 1996, which is the date AWS sent its request for a new interconnection agreement to US WEST. AWS and US WEST shall engage in the two



(2) separate true-up activities as agreed to under the AWS Prop. Ex. 13 and AWS Ex. 14 contracts.

**Rationale:** The parties dispute the effective date of the reciprocal compensation obligation under FCC Rule 51.717(b). AWS asserts it is entitled to reciprocal compensation from October 3, 1996, the date that it submitted to US WEST its request for interconnection. US WEST contends that the stay of FCC Rule 51.717(b) by the Eighth Circuit Court of Appeals precludes enforcement of the reciprocal compensation obligation until November 1, which is the date the Court lifted the stay as to CMRS related issues. In short, US WEST claims that November 1 was the "effective date" of the FCC Order on this issue.

US WEST's legal interpretation is not correct. An order of an administrative agency, such as the FCC, that is initially stayed and then allowed to go into effect is effective as of its initial issuance date. Although the Eighth Circuit Court of Appeals temporarily stayed the effectiveness of FCC Rule 51.717(b), the Court lifted the stay on November 1. Thus, the Rule went into effect permitting reciprocal compensation from the original submission of an interconnection request. In this case, the lifting of the temporary stay rendered the Rule effective on October 3, the day AWS submitted its request for interconnection. If AWS does not receive reciprocal compensation from the original effective date of the FCC Order, AWS will be denied the benefit which it had been unjustly restricted from receiving due to the erroneous entry of a stay. AWS, in effect, is entitled to be restored to that which it would otherwise have lost by means of the stay. See Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134 (1919); Ex Parte Lincoln Gas & Electric Light Co., 256 U.S. 512 (1921); Middlest Motor Freight Bureau v. U.S., 433 F.2d 212 (8th Cir. 1970).

AWS and US WEST have separately agreed to two (2) separate contracts involving a true-up for reciprocal compensation based on the results of this arbitration proceeding. (AWS Prop. Ex. 13 and AWS Ex. 14). The first agreement for true-up relates to the period of time during 1996. (AWS Prop. Ex. 13). The second relates to the period from January 1, 1997 to the date of the Commission's decision in this arbitration. (AWS Ex. 14). Together, the agreements require AWS and US WEST to perform two (2) separate true-ups for reciprocal compensation back to October 3, 1996.

#### **E. Whether the 1994 Contract Rate Changed**

**Issue:** Whether Subsequent Agreements Replace the 1994 Contract Rate

**Applicable Law:** As the trier of fact, the ALJ has looked to the terms of the contract to ascertain the parties' intentions. Subsequent oral or documentary testimony is not considered.

**Decision:** Agreements subsequent to the 1994 agreement between AWS and US WEST changed the compensation relationship between the parties.

**Rationale:** This record establishes that the parties established an interconnection agreement in 1994. The record does not conclusively establish whether that agreement was terminated on December 31, 1996 or continued in effect after this date. US WEST stands to benefit from being able to charge rates that were set during a monopoly environment, rates that have no reference to US WEST's costs. Because US WEST may have the benefit of charging rates, the Company has the burden of proving that the agreement continued after December 31, 1996. To determine this question, the Judge believes that the parole evidence rule requires that the intention of the parties must be ascertained from the language contained in the pertinent agreements, Exhibits 13, 14 and 15. US WEST relies on an "evergreen clause" in the 1994 agreement for support of its claim that the agreement is still in effect. The Judge notes that neither party has presented the language of the "evergreen clause" for the Judge's scrutiny. Upon review of Exhibits 13, 14 and 15, the Judge finds that the 1994 contractual relationship between the parties continued except the parties intended to clarify compensation issues. Exhibits 13, 14 and 15 show that AWS and US WEST had substantial, dynamic disagreements over their compensation relationship and that these parties intended to change their compensation relationship. The Judge finds that US WEST has failed to prove that the parties intended to continue the 1994 compensation rates after December 31, 1996. Exhibits 13, 14 and 15 do not clearly state what rates apply; rather, those exhibits focus primarily on true-ups. The Judge intends that the parties should honor the agreements identified in Exhibits 13, 14 and 15.

#### **F. Reciprocal Compensation/Symmetrical Compensation**

**Issue:** Should AWS receive rates for switching by its mobile switching center ("MSC") that are equal to what US WEST receives for tandem switching?

**Decision:** Because AWS's MSCs are comparable to US WEST's tandem switches, symmetric compensation should apply. AWS is entitled to be compensated at US WEST's tandem rate for US WEST traffic terminated at AWS's MSC.

**Rationale:** Paragraph 1090 of the FCC's First Order directs that states consider the functionality and geographic area to be served by a competitor's switch in comparison to the LEC's switch. AWS's MSC switches appear to function in both end office and tandem capacities. AWS's cell site control switch and cell sites work together to perform end office type functions. Exhibit 4 and 7. AWS's MSCs perform transit functions by routing calls to other wireless carriers to complete the roaming calls of its customers. Id. at 10. By virtue of the MSCs' technical capabilities and interconnections with other networks and AWS's roaming agreements with other wireless carriers, AWS subscribers can place and receive calls for out-Minnesota.

US WEST asserted that AWS's MSC switches do not have the same functionality of its tandems, particularly with respect to transport. The Company identified numerous decisions by other State Commissions that have determined that a wireless network does not qualify to be compensated at the tandem rate. Given the quantum of proof imposed on a LEC on this type of issue, the Act's focus on competition

and accommodation to new technologies, the ALJ is surprised by these decisions. However, the Minnesota Commission addressed this issue as it relates to Minnesota competing local exchange carriers who do not have wireless networks in the Consolidated Arbitration Proceeding. Consolidated Arbitration Order at 70-72. The Commission stated that it was inappropriate to focus on "certain technical and functional differences between US WEST's tandems and typical CLEC switches". *Id.* at 71. The ALJ is unpersuaded that the technical differences between AWS's MSO warrants treating AWS's MSO like a US WEST end office. US WEST has failed to prove that the difference justifies different compensation in rates.

In the Consolidated Arbitration Proceeding, the Commission was very cautious about imposing an asymmetrical compensation mechanism on a new entrant. A continuation of this caution is warranted. Consolidated Arbitration Order at 71-72.

### **G. Application of Access Charges**

**Issue:** Whether access charges should apply to intra-MTA interstate roaming calls.

**Applicable Law:** All CMRS calls which originate and terminate within the same major trading area ("MTA") are to be treated as local calls. (FCC Order, ¶ 1036.) Traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under 47 U.S.C. § 251(b)(5), rather than interstate or intrastate access charges. (FCC Order, ¶ 1043.)

**Decision:** Access charges should not apply to intra-MTA interstate roaming calls.

**Rationale:** Paragraph 1043 of the FCC's First Order specifically speaks of interstate roaming traffic, and states that "the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS can continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges". Based on this language, the FCC seeks to maintain the status quo ante with respect to access charge payments for interstate roaming traffic. US WEST has failed to prove that prior to the FCC's First Order, AWS's originating intra-MTA roaming traffic was subject to access charges. It is appropriate to use the rates found in the parties' interim agreement, Exhibit 13, because US WEST has agreed to the use of the consolidated arbitration rates. It is appropriate to use those rates trued-up back to January 1, 1997.

### **H. Access to Unbundled Network Elements**

**Issue:** Whether AWS must follow US WEST's bona fide request (BFR) process for access to Unbundled Network Elements.

**Applicable Law:** An incumbent LEC must provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. (47 U.S.C. § 251(c)(3)). At a minimum, the following elements must be unbundled: network interface device, local loop, switching capability, interoffice transmission facilities, signaling networks, call-related data bases, operational support systems, and operator services and directory assistance. (47 C.F.R. § 51.319.)

**Decision:** US WEST's proposed BFR process for each UNE is inconsistent with the FCC rules and should not be allowed. US WEST is required to provide nondiscriminatory access to unbundled network elements at any technically feasible point. A network element is considered technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier. If AWS determines that another aspect of unbundling is required for a specific wireless application, US WEST must negotiate with AWS in good faith for such application. Such an element must be provided unless US WEST demonstrates it is not technically feasible.

**Rationale:** In the Consolidated Arbitration Proceeding, the Commission rejected US WEST's request for a BFR process for each request for subloop access. The Commission stated that it found "US WEST's request for a BFR process for each request for subloop access reverses the thrust of the Act and the FCC rules and the burden of proof established in the Commission's own procedural order." Reconsideration Order at 16. The Commission's reasoning applies with equal force to this case.

US WEST must provide nondiscriminatory access to UNE at any technically feasible point and must accommodate wireless applications. A State Commission may require unbundling of additional elements on a case-by-case basis if it is technically feasible. (47 C.F.R. § 51.317.) Under the burden of proof established for this proceeding, US WEST has the burden of proving the unavailability of particular unbundled network elements.

## **I. Access to US WEST Operational Support Systems**

**Issue:** Whether US WEST is required to provide AWS access to its operational support systems on an unbundled basis equivalent to the access US WEST enjoys.

**Decision:** US WEST's operational support system is a network element. Because US WEST's operational support system is a network element, both the Act and FCC mandate access on a nondiscriminatory basis. To meet the Act's and the FCC's requirements, US WEST must provide access to AWS at least equal in quality to that enjoyed by US WEST. Because the record is void of any proposal by US WEST to provide such parity, it is reasonable to apply the electronic interfaces proposed by AWS.

**Rationale:** Same as for Access to Unbundled Elements

#### **J. Compensation for Terminating Traffic**

**Issue:** Is US WEST required to compensate AWS for terminating paging traffic that originates on the landline network?

**Applicable Law:** Paging providers are defined in the FCC Order as "telecommunications carriers," and under the Act, all telecommunications carriers are entitled to reciprocal compensation from incumbent LECs. (47 U.S.C. §251(b)(5)). The FCC Order states the rule in no uncertain terms. "Accordingly, LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, . . . ." (FCC Order, ¶ 1008) (emphasis added). The FCC reiterates this rule as follows, "[P]aging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carrier's networks, . . . ." (FCC Order, ¶ 1092). (Emphasis added.)

**Decision:** AWS is not required to pay for the termination of any US WEST originated calls through direct termination charges. AWS is allowed to charge for the termination of US WEST originated paging calls based on the outcome of the FCC's future review of this issue that is provided under the FCC Order.

**Rationale:** There is no exclusion in the Act or the FCC Order that would prevent application of the clear rule prohibiting US WEST from charging AWS, as a paging service provider, for the termination of US WEST-originated traffic.

#### **K. Facilities Used to Transport Paging Traffic**

**Issue:** Should US WEST be prohibited from charging AWS for the facilities associated with transporting paging traffic originated on the US WEST network and terminated on AWS' paging network?

**Applicable Law:** The law applicable to compensation for terminating traffic applies to the issue of facilities used to transport paging traffic as identified in section G(1) above. In addition, the FCC expressly prohibits the imposition of charges as they had been applied in the past.

We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a

LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

(FCC Order, ¶ 1042) (emphasis added).

**Decision:** AWS is not required to pay US WEST for any usage of facilities associated with the delivery of paging services.

**Rationale:** The requirement that paging providers be compensated for the termination of LEC-originated traffic similarly requires they not be charged for the facilities used to deliver such traffic. Paragraph 1042 of the FCC Order expressly prohibits the imposition of such charges. Because US WEST may not charge for the termination of such traffic, the facilities used for the delivery of such traffic must also be paid for by US WEST, which would otherwise impose a charge for LEC-originated traffic through a back-door.

#### **L. Access to Poles, Ducts, Conduits, and Rights of Way**

**Issue:** Whether US WEST has complied with federal access provisions and whether the company has substantiated its claim to reserve capacity from maintenance and administrative purposes.

**Applicable Law:** Section 251(b)(4) of the Act places the duty on US WEST to "afford access to poles, ducts, conduits, and rights of way . . . to competing providers of telecommunications on rates, terms, and conditions that are consistent with section 244". Section 244(f)(1) requires utilities to provide "nondiscriminatory access to any pole, conduit, or right of way owned or controlled by it". This language is repeated in 47 C.F.R. § 1.1403. Paragraph 1163 of the FCC's First Order requires "utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the parties seeking access."

**Decision:** AWS should be afforded nondiscriminatory access to US WEST's rights of way and related facilities on the same terms and conditions which US WEST provides to itself or a third party in accordance with section 251(b)(4) of the Act. Such access must accommodate the different technological needs of AWS as a CMRS provider to the extent technically feasible.

**Rationale:** US WEST asserts that the Act does not require it to construct or rearrange facilities for another carrier but admits that the Commission could order the company to construct or rearrange its facilities to reasonably accommodate the parties seeking access to its facilities. US WEST Exhibit 23 at 18, Tr. Vol. 2 at 311. US WEST claims that it needs a certain level of spare capacity for maintenance and administrative purposes. Exhibit 23 at 17. However, at the hearing, the Company indicated that apart from duct and conduit where US WEST needed to reserve 15 percent capacity for

maintenance and administration, the Company did not need to reserve capacity on poles or rights of way. Tr. Vol. 2 at 309-10. In the Consolidated Arbitration Proceeding, the Commission held that US WEST could "maintain spare capacity only as reasonably necessary for maintenance and administrative purposes, based upon generally accepted engineering principles". Consolidated Arbitration Order at 44. US WEST has failed to prove in this proceeding that generally accepted engineering principles require it to reserve 15 percent of the capacity of ducts and conduits for maintenance and administration. US WEST must make reasonable efforts to accommodate access by AWS to US WEST facilities in accordance with applicable law. Disputes over whether a reasonable accommodation has been made should be submitted to the Commission.

#### **M. Contract Language**

**Issue:** Whether AWS's or US WEST's contract more clearly, effectively and pro-competitively delineate the parties' rights and responsibilities.

**Applicable Law:** A party petitioning for arbitration is required to provide the State Commission with "all relevant documentation concerning (i) the unresolved issues; (ii) the position of each party with respect to those issues; and (iii) any other issue discussed and resolved by the parties". 47 U.S.C. § 252(b)(2)(A). A State Commission is empowered to "impose appropriate conditions . . . upon the parties to the agreement . . . . 47 U.S.C. § 252(b)(4)(C). The Act contemplates an actual contract emerging from the arbitration providing for subsequent State Commission review of "an agreement adopted by arbitration . . . ." 47 U.S.C. § 252(e)(2)(B).

**Decision:** AWS' proposed interconnection agreement complies with federal law and should be adopted as the agreement of the parties except as otherwise modified or limited by the decisions in this arbitration.

**Rationale:** The Judge specifically finds that the AWS contract more comprehensively addresses technical interconnection matters and contains general terms and conditions customarily contained in standard commercial agreements. The AWS contract more comprehensively addresses issues that, if not addressed, might delay or prevent the parties' achievement of an interconnection agreement. The US WEST proposed contract deals with several crucial areas by setting them aside for resolution by a separate agreement. Setting issues aside without the agreement of the parties could delay implementation and achievement of an interconnection agreement. Notwithstanding the fact that US WEST's proposed contract has been selected as the template by other State Commissions, the Commission has rejected US WEST's proposed contract in favor of AT&T's proposed contract language in the Consolidated Arbitration Proceeding. Consolidated Arbitration Order at 7.

#### **N. Service Quality Standards**

**Issue:** What service quality standards should be included in the interconnection agreement between US WEST and AWS?

**Applicable Law:** Incumbent LECs must provide interconnection on a reasonable and nondiscriminatory basis "that is at least equal in quality to that provided by the [incumbent] to itself or to any subsidiary, affiliate or any other party . . . ." 47 U.S.C. § 251(c)(2). FCC Rule 511.305 requires at a minimum a level of quality equal to that which the incumbent LEC provides itself. To the extent technically feasible and at the request of a carrier, the incumbent LEC is required to provide interconnection that is superior in quality. 47 U.S.C. § 252(d) requires the Commission to resolve open issues by "imposing appropriate conditions . . . ."

**Decision:** US WEST must provide AWS with at least the same quality of service which it provides to itself or to any other carrier. Specific design, technology and performance standards which ensure service quality are an essential part of the relationship between AWS and US WEST. It is appropriate to include them as a part of the agreement.

**Rationale:** Service quality standards are important for providing wireless services. Over the years, AWS has experienced problems with US WEST in terms of provisioning delays, service outages and blocking. Exhibit 3 at 36-37. Wireless services are becoming more and more useful to consumers. In emergency situations, wireless services are often the only type of communication service available. Exhibit 1 at 43.

US WEST has failed to present evidence regarding its internal quality or performance standards. To assure that its customers receive the quality of service to which they have become accustomed, AWS has drafted detailed quality and performance standards. The AWS service quality and performance standards relate directly to the functions of Network Reliability, Network Interface Specifications, Error Performance, Operations and Administration of Outages. Each of the proposed quality and performance standards is based on specific industry standards, reliability objectives and performance specifications. Exhibit 4 at 12-15.

US WEST does not believe that it is appropriate to impose specific performance standards in the agreement and that it is more appropriate for US WEST to monitor its own performance to assure parity in the delivery of services. The Judge believes that this proposal is inadequate. The other proposal recommended by US WEST -- that service quality and performance standards be deferred to a generic proceeding on these issues -- is more appealing. However, the proceeding that US WEST proposes the issue to be deferred, may have to be expanded to accommodate this matter (Docket P421/M-96-729,855; 909-Merged) as a general generic issue. Nevertheless, the Judge does not adopt this proposal insofar as it would delay the achievement of an interconnection agreement between US WEST and AWS. The service quality standards proposed by AWS should be approved.

US WEST appears to oppose the mechanism for ensuring compliance with the performance standards. The company appears to claim that the performance credits



constitute an unenforceable liquidated damages clause inconsistent with the requirements of Gorco Construction Company v. Stein, 99 N.W.2d 69 (Minn. 1959). This claim has no merit because US WEST has not made any meaningful effort to demonstrate that the performance credits proposal fails to comply with the standards articulated in Gorco Construction Company v. Stein.

## **IX. RECOMMENDATION**

Based on the foregoing assessment and arbitrated decisions, the Administrative Law Judge recommends to the Minnesota Public Utilities Commission that the Commission:

1. Approve final arbitrated agreements between AWS and US WEST in accordance with the prices, terms and conditions determined to be appropriate in this Report.
2. Require that AWS and US WEST sign arbitrated agreements within a reasonable time after the Commission's Order.
3. Require that AWS and U.S. WEST begin implementation within 30 days after final approval of the arbitrated agreements.

Dated this 6th day of June 1997.

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ALLEN E. GILES  
Administrative Law Judge

Court Reported: Janet Shaddix & Associates  
Bloomington, Minnesota